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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. AMOS JACKSON, III, et al., Defendants and Appellants.	B259915 (Los Angeles County Super. Ct. No. LA068581)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Affirmed in part, reversed in part, and remanded with directions.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant, Amos Jackson, III.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant Charles Spencer.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant, Jeffery Thompson.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Amos Jackson, III, Charles Spencer, and Jeffery Thompson, appeal from the judgments and sentences following their convictions for multiple armed robberies and related crimes.[1] Appellants raise numerous issues on appeal, including claims based on the prosecutor's exclusion of the sole African-American prospective juror and alleged misconduct during closing arguments. Appellants also assert evidentiary challenges and allege sentencing errors.

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[1] Appellant Thompson's first name is listed as "Jeffrey" on his notice of appeal. However, in all other places in the record, including the preliminary hearing transcript, the information, the jury verdicts, the probation officer's report and the abstract of judgment, appellant's first name is listed as "Jeffery." Accordingly, we use Jeffery as Thompson's first name. On remand, if appellant Thompson's first name is determined to be "Jeffrey," the trial court should correct the case caption.

For the reasons set forth below, we affirm the convictions, correct the abstracts of judgment, vacate the sentences on count 9 (grossly negligent discharge of a firearm) and remand for resentencing on that count.

STATEMENT OF THE FACTS

A jury convicted appellants of six counts of second degree robbery (Pen. Code, § 211; counts 1-6),[2] and one count of discharging a firearm with gross negligence (§ 246.3; count 9). The jury also found appellant Jackson guilty of being a felon in possession of a firearm with two prior convictions (§ 12021, subd. (a)(1); count 10), and found true the allegation that he personally used a firearm during the commission of the robberies (§ 12022.53, subd. (b)). As to appellants Thompson and Spencer, the jury found each guilty of being a felon in possession of a firearm with one prior conviction (§ 12021, subd. (a)(1); counts 11 & 12), and found true the allegation that each personally used a firearm (§ 12022.53, subd. (b)).

In a bifurcated proceeding, the trial court found true the allegations that Jackson had suffered two "strikes" within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had a prior serious felony conviction (§ 667, subd. (a)(1)); that Spencer had suffered three "strikes," had a prior serious felony conviction (§ 667,

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[2] All further statutory citations are to the Penal Code, unless otherwise stated.

subd. (a)(1)), and had served a prior prison term (§667.5, subd. (b)); and that Thompson had suffered two "strikes," had two prior serious felony convictions (§ 667, subd. (a)(1)), and had served a prior prison term (§ 667.5, subd. (b)).

The trial court sentenced each appellant to 74 years in state prison, plus 175 years to life. Appellants timely appealed.

STATEMENT OF THE CASE

A. *Prosecution Case*

Stephanie Edell testified that on August 8, 2011, at around 1:00 p.m., she was working at Hair and Compound, a store that sells hair extensions. Two other employees, Clarisa Pettiford and Diana Vargas, also were present. Edell had just sold some hair extensions to Jenny MacDonald and Crystal Leigh Andrews when three African-American males entered the store. One of the men was wearing a black shirt, black shorts, orange vest and black horn-rimmed glasses; the other two wore jeans. The man wearing glasses stated he wanted to talk about refinancing the building. Edell responded, "We just lease here." All three men then pulled out guns and told the women to empty their pockets. Edell gave the robbers $300, and MacDonald and Andrews gave them money, car keys, and cell phones.

The robbers tied the hands of MacDonald, Andrews, Edell and Pettiford, and had them lie down on the floor. Two robbers took Vargas to the production room, where the hair

extensions were stored, and Edell heard "a bunch of noise" coming from the room. Edell's cell phone began ringing, but the robber who remained behind told Edell not to answer. The store's owner, Elizabeth Dirks, then walked into the store. The robber ordered Dirks to drop her bags and get down on the floor, and she complied.

Shortly thereafter, another employee, Aldo, entered the store. Edell deduced that Aldo ran away when he observed the robbery in progress, because she heard the robber say, "We have a runner. We have a runner." The two robbers who were in the production room then ran out, and all three men exited the store. Edell and Pettiford called 911, while MacDonald and Andrews ran outside to try to record the license plate of the robbers' vehicle. After Edell called 911, she went into the production room and noticed that the store's most expensive hair products had been stolen. The hair was subsequently returned to Dirks.

Diana Vargas testified she was working in the back room of the store when she heard some noise in the front of the store. As she walked toward the front, she observed two African-American men through the transparent curtain that separated the back room from the front. One of the men was holding a gun. He asked Vargas if there was anyone else in the back, and she answered, "No." The man then placed the gun against Vargas's back and told her to walk to the front of the store. When she reached the front, she saw a man wearing glasses pointing a gun at her co-workers. At trial, Vargas identified the man wearing glasses as Spencer, and

the other two men as Jackson and Thompson. "Elizabeth, the [store's] owner" then walked into the store.[3] Vargas observed one of the robbers "pull[ing]" her and could hear the robbers going through Dirks's bags.

At trial, Pettiford also identified appellants as the robbers. She stated that Spencer was wearing the same glasses at trial that he wore when he robbed the store. She further stated that Spencer had worn distinctive black and yellow shoes at the time.

MacDonald testified she had gone to Hair and Compound with Andrews to buy some hair extensions. Three men walked into the store and robbed them. The robbers took MacDonald's cell phone and between $60 and $400 in cash. They took Andrews's cell phone and car keys, as well as more than $1,000 that Andrews had brought to buy hair products. After the robbers exited the store, MacDonald ran out after them. She noticed a U-Haul van parked in the store's parking lot. The van's driver, an African-American man, looked at her before driving away. Although MacDonald did not see the robbers enter the van, she observed the back door of the van shutting as it drove off, and inferred that they were in the van.

MacDonald testified that the appellants "reasonably resembled" the robbers. She was particularly confident

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[3] Vargas did not mention the store owner's last name. However, the information states that her full name is Elizabeth Dirks.

about her identification of Spencer. As a hairdresser, she recognized Spencer based on his "silhouette," i.e., his cheeks, jawline and the fact that he wore glasses. MacDonald testified her stolen cell phone was recovered and returned to her the next day. She recognized her phone because its screen saver is a photograph of her young son "dressed in a Spiderman head with a cowboy body."

Brian Howard testified he was parked near Hair and Compound when he observed a U-Haul van speed away from the store. Two or three females with their hands tied behind their backs then came out of the store. Howard immediately called 911, and while on the phone with the 911 operator, began following the van. As the van entered the southbound 405 freeway, Howard continued his pursuit. He noticed an individual wearing large rimmed glasses looking out the back window of the van. Moments later, Howard heard seven gunshots coming from the van. Howard slowed down. The van moved into the fast lane before finally exiting at the Valley Vista off-ramp. Howard noticed a black-and-white patrol vehicle following the U-Haul van off the freeway.

Los Angeles Police Department (LAPD) Detective Supervisor Vinh Do was driving when he heard over the police radio that a robbery had just occurred and that the suspects had fled in a U-Haul. Do heard that a witness was following the U-Haul, that the van had entered the southbound 405 freeway via the Sherman Way on-ramp, and that someone from the van was shooting. Do entered the southbound 405 freeway at the Burbank Boulevard on-ramp

and drove slowly until a U-Haul van passed him. The detective followed the van as it exited at Valley Vista.

Do observed the U-Haul van make a right onto Sherman Oaks Avenue before losing sight of it for five to eight seconds. When the detective made his right turn onto Sherman Oaks, he noticed the van parked at the corner of Sherman Oaks and Sepulveda. Do slowly drove past the van and saw no one inside. As he proceeded down Sherman Oaks, he noticed two black men standing on the porch of a nearby house with their backs toward him. One of the men was carrying a sawed-off shotgun. Both men were wearing dark clothing: one was wearing a black shirt and dark jeans, the other was wearing shorts. After Do drove past them, he turned and saw the men climb over a gate into the backyard of a house. He called for assistance and started setting up a perimeter to contain the suspects.

LAPD Officer Jason Schwab, a member of the Metropolitan K9 Division, testified he participated in searching for the suspects. As Schwab, his canine, and other search team members were preparing to enter the backyard of the house where the suspects were last seen, Jackson stepped out from the bushes in front of the house and surrendered. After taking Jackson into custody, the search team entered the backyard. Schwab's dog searched the bushes along the fence line before locating Spencer at the corner of the property. When the dog began barking at Spencer, he tried to climb the fence before complying with police orders to come down. Spencer was wearing a dark top

and dark shorts. Schwab continued searching the general area and located a .45-caliber handgun in the yard of the adjoining house.

LAPD Officer Anthony Smith testified that at around 7:00 p.m., he and his partner were given a picture of Thompson and requested to assist in locating him. They were patrolling in the area of Greenleaf and Saugus Avenues, just east of Sepulveda Boulevard, when Smith noticed Thompson walking southbound. Thompson stopped and looked in the officers' direction. Smith's partner stated, "Hey. That's the guy right there."

Thompson began walking away quickly, and the officers started trailing him. When they lost sight of Thompson, Smith's partner exited the patrol vehicle and, accompanied by other officers, began searching the area where Thompson was last seen. Smith then heard officers verbally ordering someone to lie on the ground. Smith exited his vehicle and ran toward the location. He noticed hair protruding from Thompson's right front pants pocket. Smith patted Thompson for weapons, but left the hair in his pocket.

LAPD Officer Carlos Gonzalez testified he had been working the perimeter when Thompson was detained. Gonzalez and his partner drove to Thompson's location to transport him to custody. Gonzalez searched Thompson and recovered an iPhone and hair extensions on his person. Officer Gonzalez placed the items into a property bag. LAPD Detective Carlos Figueira testified he booked the property bag into evidence.

LAPD Detective Jeff Case testified he looked through the property bag containing the items recovered from Thompson. He turned on the iPhone and saw a picture of a child wearing a cowboy costume with a Spiderman mask. The picture was shown to the jury. Detective Case testified he returned the iPhone to MacDonald that evening.

LAPD Detective Ammon Williams testified that he and his partner Stevens recovered several bullet casings from the southbound 405 on-ramp located at Sherman Way. Detective Figueira testified he booked the casings into evidence. Detective Figueira also testified he booked other evidence collected by officers, including over $2,000 in cash, another iPhone, and a gray flip phone.

LAPD Detective Vivian Flores testified she performed a visual inspection of the U-Haul van before it was towed to the police impound yard. She saw plastic bags containing hair, a water bottle, and a cell phone. Detective Flores opened the glove compartment, and saw gloves and a U-Haul rental agreement inside.

LAPD Sergeant John Cheun testified that on August 9, he searched the U-Haul van at the impound yard. Cheun recovered several trash bags filled with hair extensions, which he returned to Hair and Compound. He also recovered a beanie, a white T-shirt, a plastic water bottle, several latex gloves, zip ties and a U-Haul rental agreement.

Sergeant Cheun took oral swabs from each appellant. After the swabs dried in his office, he stored them in sealed evidence envelopes, marked with the name of the individual

from whom the swab was taken. He booked the envelopes in the Van Nuys police station's property room.

LAPD Criminalist Heather Simpson testified that she swabbed the items recovered, including three pairs of gloves and a water bottle. Simpson sent those swabs and appellants' oral swabs to Bode Technology for deoxyribonucleic acid (DNA) analysis. On cross-examination, Simpson acknowledged that on the shipping manifest, she incorrectly labeled a sample as from the outside of a glove when it was actually from the inside. Her report, however, correctly identified the sample. LAPD Criminalist Monica Zielinski testified she swabbed a beanie and a white T-shirt. After collecting the swabs, she packaged and shipped them to Bode.

Rebecca Preston, a DNA analyst with Bode at the time, testified she received swabs to process from the Los Angeles Police Department on December 2, 2011. Preston checked the paperwork to confirm that the descriptions were accurate. Preston's notes showed the swabs were shipped by United Parcel Service, signed for by a Bode employee (Ben Beaver), and then booked and stored in a secured room by another employee, Ashley Kimball. Preston then checked out the items and processed them.

Preston testified that test results showed that swabs taken from the outside and inside of various gloves contained DNA that matched appellants' respective DNA profiles. She also testified that the swab of the water bottle had DNA that matched Thompson's DNA profile.

Amanda Duda, a forensic DNA analyst with Bode, testified she performed DNA testing on swabs taken from the beanie and the white T-shirt. The swabs contained DNA that matched Thompson's DNA profile.

LAPD Criminalist Patrick Thompson testified that he collected a latent fingerprint from the inside cargo door of the U-Haul van. Forensic print specialist Nicole Osborn testified the latent print matched Spencer's fingerprint exemplar.

B. *Defense Case*

Jackson testified in his own defense. He denied being involved in the robbery of Hair and Compound or getting into a U-Haul van the day of the robbery. According to Jackson, on August 8, he was on federal probation and living in a halfway house. He woke up early that morning to check out of the halfway house and went to his wife's home. From there, he was picked up and brought to a house on Sherman Oaks to work. He was cleaning the yard with two other "paisas" -- persons of Hispanic descent -- when he was arrested. Jackson stated that he did not know many of the other residents of the halfway house. He denied ever seeing Thompson and Spencer before they were all arrested, and was unaware that they also resided in the halfway house.

Spencer did not testify, and called Detective Flores as his sole witness. Detective Flores testified she transported Pettiford to a field showup. Pettiford asked the officers to have Spencer come closer so she could examine his socks. Pettiford did not mention Spencer's shoes.

Thompson did not testify or present an affirmative defense.

DISCUSSION

A. *Jury Selection*

Appellants, who are all African-American, contend the prosecutor violated their state and federal constitutional rights to equal protection and a jury drawn from a fair cross-section of the community by peremptorily excusing Juror No. 42, the sole African-American in the jury pool. (See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).)

1. *Relevant Factual Background*

Juror No. 42 was a divorced mother of four children who worked in member services for a wholesale store. During voir dire, she was asked whether she understood that a prosecution witness's testimony should not be rejected merely because it was favorable to the defense. She answered in the affirmative.

During the exercise of peremptory challenges, Juror No. 42 moved into the jury box to replace an excused juror. The prosecutor then asked for a sidebar in anticipation of a challenge to his excusal of Juror No. 42. The trial court asked the prosecutor whether he was moving to excuse the juror, and he stated, "Yes." The court then asked defense counsel whether they wished to make any motions, and all three counsel objected to the excusal.

The trial court noted that the prosecutor previously had used 12 peremptory challenges, two to excuse Hispanics and the rest to excuse either Caucasians or Asian-Americans. The court stated, "I am not finding a prima facie showing that the People have used a peremptory challenge on a race based reason." However, "if the People want to state reasons, . . . they're welcome to do so." The prosecutor then explained that he sought to excuse Juror No. 42 because "every time I looked in her direction, if she was even looking at me she would immediately look away. She has long stares at the defendants. However, when I'm talking and when I'm conducting my voir dire she doesn't look at me while all the other jurors are looking at me." The prosecutor also stated that he excused at least four other persons for the same reason.

The trial court denied the defense motion, finding no prima facie showing that the prosecutor had impermissibly exercised his peremptory challenge.

2. *Analysis*

"The purpose of peremptory challenges is to allow a party to exclude prospective jurors who the party believes may be consciously or unconsciously biased against him or her. [Citation.] However, the use of peremptory challenges to remove prospective jurors from the panel solely on the basis of group bias violates the right of the defendant to a jury drawn from a representative cross-section of the community. [Citations.]" (*People v. Jackson* (1992) 10 Cal.App.4th 13, 17-18, italics & fn. omitted.) "[A]

peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality[,] . . . rang[ing] from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative." (*Wheeler*, *supra*, 22 Cal.3d at p. 275; accord *People v. King* (1987) 195 Cal.App.3d 923, 933.)

Trial courts engage in a three-step process to resolve claims that a prosecutor used peremptory challenges to strike prospective jurors on the basis of group bias -- that is, bias against "'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds.'" (*People v. Avila* (2006) 38 Cal.4th 491, 541.) "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.) "[I]f a trial court has determined that no prima facie case of discrimination exists, then allows or invites the prosecutor to state reasons for excusing the juror, but refrains from ruling on the validity of those reasons," the appellate court should review the first-stage ruling first. (*People v. Scott* (2015)

61 Cal.4th 363, 386.) Only if the appellate court finds that appellants have shown the "totality of the relevant facts . . . give[s] rise to an inference of discriminatory purpose" should the reviewing court determine whether there was "purposeful racial discrimination." (*Id*. at p. 391.)

After examining the record, we conclude that appellants have not shown "the totality of the relevant facts . . . give[s] rise to an inference of discriminatory purpose." Excusing the sole African-American juror in a jury pool is rarely sufficient to raise an inference of discriminatory purpose. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 343 [no prima facie showing of bias made where defendant relied principally on fact that both of two African-Americans were excused]; accord *People v. Hamilton* (2009) 45 Cal.4th 863, 899 [excusal of sole African-American in first group of 20 prospective jurors held insufficient to establish prima facie showing].) Here, aside from the fact that the prosecutor excused the sole African-American prospective juror, no other evidence suggests that exercise of the challenge was based on the juror's race. *People v. Long* (2010) 189 Cal.App.4th 826 is inapposite, as that case involved a third-stage ruling. There, the appellate court determined that the prosecutor's race-neutral explanations for exercising the challenges were not persuasive. (*Id*. at p. 840.) In contrast, here, we have determined that the trial court's first-stage ruling is correct. Thus, we need not address the race-neutral reasons provided for exercising the challenge, except to note that the trial court implicitly found

they reflected no racial bias. (*People v. Scott*, *supra*, 61 Cal.4th at p. 391.)

B. *Sufficiency of the Evidence of the Robberies Charged in Counts 2 and 4*

The jury convicted appellants of second degree robbery of Dirks and Andrews. Neither Dirks nor Andrews testified at trial. Appellants contend there was insufficient evidence for a reasonable jury to find that appellants used force or fear to deprive Dirks and Andrews of their personal property, from their person or immediate presence, and against their will (§ 211). We disagree.

"In determining whether the evidence is sufficient to support a conviction or an enhancement, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] Under this standard, 'an appellate court in a criminal case . . . does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Rather, the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224, italics omitted.) "In deciding the sufficiency of the evidence, a reviewing court resolves

neither credibility issues nor evidentiary conflicts. [Citation.] . . . Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Here, Edell, MacDonald, and Vargas testified that the robbers were armed with guns. Edell and MacDonald testified that the robbers demanded that the women in the store empty their pockets. Edell gave the robbers $300, MacDonald gave them between $60 and $400, and Andrews handed over more than $1,000 in cash. Edell and Vargas testified that Dirks entered the store while the robberies were in progress. She was ordered to get on the floor and complied. The robbers then took hair extensions from the store. As Dirks owned the store, the hair extensions were her property. When the robbers were subsequently arrested, police recovered trash bags of hair extensions, which were returned to Dirks. The police also recovered more than $2,000 in cash. As that amount exceeded the money taken from Edell and MacDonald, it necessarily included the money taken from Andrews. On this record, there was sufficient evidence for the jury to find that appellants committed second degree robbery of Dirks and Andrews.

C. *Chain of Custody for DNA Samples*

Appellants contend the trial court erred in admitting the results of the DNA tests, as "gaps and mistakes in collecting, processing, and preserving the evidence rendered the chain of custody inadequate." As the California

Supreme Court has stated: "In a chain of custody claim, "'[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' [Citations.] The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

1. *DNA Samples Taken from Appellants*

Sergeant Cheun testified he took oral swabs from each appellant. After the swabs dried, he stored them in the Van Nuys police station's property room in sealed and marked envelopes. Criminalist Simpson testified she sent appellants' oral swabs to Bode. Preston, a DNA analyst with Bode, testified that a Bode employee (Beaver) signed for the items, and another employee (Kimball) booked and stored them in a secured room. Preston then checked out the items and processed them.

Appellants contend the testimony failed to establish "key foundational issues about the chain of custody," such as whether only authorized people had access to Cheun's office, whether the swabs were sealed when delivered to Bode, whether the swabs were properly booked into evidence at Bode, and whether Bode employees followed proper protocol for transferring the evidence. We conclude that on the record before us, it is reasonably certain that there was no alteration of appellants' reference samples. The trial testimony established that appellants' oral swabs were in a secured location -- the Van Nuys police station -- before being sent to Bode. Nothing suggests that the samples were altered at the police station or at Bode.

Thus, appellants' arguments about the chain of custody go to the weight of the DNA evidence -- a matter for the jury's consideration. In addition, their reliance on *People v. Jimenez* (2008) 165 Cal.App.4th 75, is misplaced. There, a police sergeant testified that he arranged to have an identification bureau technician take oral swabs from the defendant and testified conclusorily that she did so. "[T]he sergeant did not testify that the technician preserved and labeled the specimen, did not testify that the technician was directed to send the sample to DOJ, did not testify that the technician or anyone else ever sent the sample to DOJ, and did not testify that the technician processed, labeled, or stored the sample." The technician did not testify. (*Id.* at pp. 79-80.) On this record, the appellate court found the chain of custody for the reference sample wholly inadequate.

(*Id*. at p. 81.) In contrast, here, Sergeant Cheun personally collected the swabs and labeled them, and criminalist Simpson testified she personally sent the reference samples to Bode. In short, there was no abuse of discretion in the admission of DNA test results based on the reference samples.

2. *DNA Samples Taken from a Water Bottle, Beanie, White T-shirt and Gloves Found in the U-Haul Van.*

Detective Flores testified she saw a water bottle and gloves in the U-Haul van when it was parked on Sherman Oaks. Sergeant Cheun testified he recovered the water bottle, gloves, a beanie and a white T-shirt from the van. He placed them into separate evidence bags and booked the items into evidence. Criminalist Simpson testified that she swabbed three pairs of gloves and a water bottle, and sent the swabs to Bode. Criminalist Zielinski testified she swabbed the beanie and white T-shirt, packaged the swabs and shipped them to Bode.

Appellants argue that the chain of custody was inadequate. They contend the items should have been recovered from the U-Haul at the scene, instead of the next day at the police impound yard. They note that no evidence was introduced explaining how the items were transported from the Van Nuys police station of the Los Angeles laboratory where criminalists Simpson and Zielinski collected the swabs. They further note that Simpson acknowledged mislabeling a sample that was sent to Bode. However, none of appellants' arguments suggests any

tampering with the evidence. The prosecution adequately showed the chain of custody from the collection of evidence to the testing of evidence. Appellants' argument goes only to the weight of the DNA test results. In short, the trial court did not abuse its discretion in admitting the results of the DNA tests on the items recovered from the U-Haul van.

3. *iPhone and Hair Extensions Recovered from Thompson*

Officer Smith testified that after detaining Thompson, he noticed hair protruding from Thompson's right front pants pocket. Smith patted Thompson for weapons, but left the hair in the pocket. Officer Gonzalez testified he recovered an iPhone and hair extensions on Thompson's person. Officer Gonzalez placed the items into a property bag, and Detective Figueira testified he booked the bag into evidence. Detective Case testified he looked through the property bag. He turned on the iPhone and saw a picture of a child wearing a cowboy costume with a Spiderman mask. Detective Case returned the iPhone to MacDonald. MacDonald testified she recognized her phone because its screen saver is a picture of her young son in that costume.

Thompson contends testimony about the iPhone and hair extensions should not have been admitted because the prosecutor failed to establish an adequate chain of custody. We disagree. There was no break in the chain of custody for the iPhone and hair extensions. Officers Smith and Gonzalez testified the items were on Thompson's person when he was detained. The items were booked into

evidence, and the iPhone was later returned to MacDonald, who testified she recognized the cell phone as hers based on the picture used as a screen saver.

D. *Other Evidentiary Challenges*

Thompson contends (1) that the trial court abused its discretion in admitting two photographs from MacDonald's phone, and (2) that the court abused its discretion in admitting bullet casings recovered on the southbound 405 freeway on-ramp at Sherman Way.

1. *Photographs of MacDonald's iPhone*

After MacDonald testified, she took and forwarded two photographs of her iPhone's screen saver (the picture of her young son in costume) to the prosecutor. The prosecutor planned to introduce the photographs during Detective Case's testimony. Thompson's counsel objected, arguing that the photographs had just been provided to her, although she was entitled to the evidence 30 days before trial. Counsel acknowledged that a description of the screen saver was in the police report. The prosecutor stated that he had just received the two photographs from MacDonald, and had provided them to all counsel at the earliest opportunity. The trial court overruled defense counsel's objection, and admitted the photographs.

Under California's reciprocal discovery statute, the prosecutor shall provide all exculpatory evidence "in the possession of the prosecuting attorney or . . . in the possession of the investigating agencies." (§ 1054.1) Absent good cause, the disclosure shall be made at least 30 days

before trial. (§ 1054.7.) "[A] violation of the California reciprocal-discovery statute . . . is not subject on appeal to the harmless-error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, and thus is a basis for reversal only where it is reasonably probable, by state-law standards, that the omission affected the trial result." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, there was no violation of the reciprocal discovery statute because the photographs were not in the possession of the prosecutor or the police until MacDonald sent them during trial. Thus, the trial court did not abuse its discretion in admitting the photographs. Moreover, any error was harmless. Defense counsel admitted that the police report described the picture used as a screen saver, and that she had timely access to the police report. The photographs also were cumulative of MacDonald's trial testimony. MacDonald testified that she used a picture of her young son as the screen saver for her iPhone. In short, it was not reasonably probable that absent admission of the photographs, Thompson would have secured a more favorable outcome.

2. *Bullet Casings*

Howard testified that as the U-Haul van entered the southbound 405 freeway, he observed an individual peering out the back of the van and immediately heard seven gunshots coming from the van. Detective Supervisor Do

testified he heard over the police radio that the robbery suspects were shooting from the U-Haul van entering the southbound 405 freeway from the Sherman Way on-ramp. Detective Williams testified he and his partner recovered several bullet casings from the on-ramp. Spencer's counsel moved to strike Detective Williams's testimony, based on the prosecutor's representation that he did not plan to present evidence that the casings matched the .45-caliber handgun found when Spencer and Jackson were arrested, or the shotgun that Detective Supervisor Do had seen one of them holding. The trial court denied the motion to strike, finding the casings relevant to the case. It noted that the evidence indicated three guns were used, and only one was recovered. Thus, the casings could have come from a firearm that was not recovered.

Thompson now contends the trial court abused its discretion in admitting the casings, as the casings "were not tied to the guns used in the crime." We find no abuse of discretion. Appellants were charged with grossly negligent firing of a firearm. The evidence indicated that shots were fired at Howard from the U-Haul van when it was entering the southbound 405 freeway via the Sherman Way on-ramp. The bullet casings were recovered from the same on-ramp. Thus, the casings were relevant evidence, corroborative of Howard's testimony. The fact that the casings were not matched with the recovered handgun goes only to the weight of the evidence, not its relevance.

E. *Closing Arguments*

Appellants contend the trial court erred in permitting the prosecutor to play, during closing argument, a surveillance video not previously shown to the jury. They further contend the prosecutor committed misconduct in rebuttal.

1. *Surveillance Video*

a. *Relevant Factual Background*

During the prosecution's case-in-chief, Ron Curado, the owner of the business across the street from the hair store, testified he produced to the police a copy of a 30- to 40-minute surveillance video. A DVD containing surveillance video, marked as People's exhibit No. 5, was produced but not played. On cross-examination, Curado testified that he had watched the video, and that although it showed adults entering Hair and Compound, the faces of the individuals could not be seen clearly.

At the close of the prosecution case, the prosecutor moved to admit the DVD containing the surveillance video into evidence. Thompson's counsel objected on the ground that the video had not been played for Curado to view and authenticate. The trial court overruled the objection, finding that Curado's trial testimony sufficiently authenticated the surveillance video. Thompson's counsel argued that the copy of the DVD she had received might not contain the surveillance video that Curado had authenticated. In response, the court admitted the video subject to a motion to strike after counsel viewed the DVD.

During closing argument the next day, the prosecutor started playing the surveillance video for the jury. The trial court stopped the proceedings and called for a sidebar. At the sidebar, the court asked Thompson's counsel whether she had viewed the video. She stated she could not get it to play on her Mac computer. She objected to the playing of the video on the ground that the jury had not seen it. The court overruled the objection, ruling that a "proper foundation [had been] laid for the disk to come in." Spencer's counsel also had a Mac and had not viewed the video. Jackson's counsel stated that he had viewed the video. He did not find anything objectionable about it, "other than the fact that it [hadn't] been played, and it's the wrong time to be playing to the jury for the first time." The court then stated: "[People's exhibit No.] 5 will be admitted subject to motion to strike if something comes up that nobody was aware of."

The prosecutor played the video for the jury. When the prosecutor described what was being shown in the video, Jackson's counsel objected. The court admonished the jury not to consider the prosecutor's description as evidence, saying, "this is closing argument. Again, this is not evidence."

b. *Analysis*

Thompson asserts the prosecutor committed misconduct in playing the video for the first time during closing argument, contending it was new evidence. (See *People v. Hill* (1998) 17 Cal.4th 800, 828 [misconduct for prosecutor to refer to facts not in evidence] overruled on

another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 & fn. 13; *People v. Bolton* (1979) 23 Cal.3d 208, 213, fn. 2 [misconduct for prosecutor to use closing argument to introduce new evidence].) Curado, however, had authenticated the video and testified to its general content. Thus, it did not constitute new evidence.

Citing *People v. Cuccia* (2002) 97 Cal.App.4th 785, Thompson argues the trial court erred in allowing the video to be played. There, the appellate court found the trial court erred in allowing the prosecutor to reopen the case and offer new evidence during rebuttal, without allowing the defendant an opportunity to offer surrebuttal. (*Id*. at p. 792.) In contrast, here, the trial court allowed defense counsel the opportunity both to view the video and to move to strike its admission. Moreover, any error was harmless. The surveillance video showed people entering and leaving Hair and Compound, but did not clearly show the people's faces. The fact that the robberies occurred was never disputed; thus, the video was no more than cumulative of the victims' testimony.

2. *Prosecutorial Misconduct*

a. *Relevant Factual Background*

During closing argument, all three defense counsel challenged the witness identifications of their respective clients and other aspects of the prosecution case.

In rebuttal, the prosecutor addressed several arguments raised by the defense. In response to the argument of Thompson's counsel that it was more difficult

for a percipient witness to identify someone of a different race, the prosecutor stated: "Let Stevie Wonder walk in right now, and see if you're confused about who that is. Well, we can't do it according to some of the argument that's being had over here. [¶] I bet President Obama walks in right now with all the security, we're not going to have a doubt. So that's ridiculous. You consider those things when it's an issue. In this case, we didn't hear any evidence that it was an issue. We didn't hear any evidence." There was no defense objection to the prosecutor's comments.

In response to the argument of Thompson's counsel that the reason Thompson walked away quickly when he saw Officer Smith and his partner was because Thompson was scared of the white officers, the prosecutor stated: "We didn't hear any evidence of his [Thompson's] fear of these people being different races than he is. She's [defense counsel] asking you to speculate. Mr. Thompson has every right not to testify. And he didn't testify. We didn't hear any evidence. He has that right." Thompson's counsel objected to the prosecutor's comments, but the trial court overruled the objection.

In response to the argument of Spencer's counsel that the prosecution had not called all relevant witnesses, the prosecutor stated: "[I]n the law there's something that's called failure to call logical witnesses. That means they don't have to put on evidence, but if they do and they're arguing about it I can argue that they have a failure to put on all logical witnesses. If they believe, for what[]ever

reason, that there [is] a problem, guess who else can subpoena people here?" The prosecutor noted that defense counsel could subpoena witnesses. Spencer's counsel objected to these comments, but the objection was overruled.

Finally, the prosecutor summarized the evidence showing that all three appellants were arrested in the same general location, in close proximity to the U-Haul van used in the robberies. He noted that Jackson had testified that the men did not know each other, but no explanation was provided as to how the three men came to be in the same location where they were arrested. He stated: "Here's the main question that I expect[ed] the defense counsels to argue if they were going to make an argument. What's not here? An explanation. Where was it they all had all this time to come up and tell you why they were there." Spencer's counsel objected on the basis of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), which prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify, and Thompson's counsel joined. The trial court overruled the objections, determining that the prosecutor was "commenting on your closing arguments."

b. *Analysis*

Appellants contend the prosecutor's comments detailed above constitute prosecutorial misconduct. "'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct . . . .'" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) However, "'[i]n order to preserve a claim of misconduct, a defendant must make a timely objection and

request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.]" (*Ibid.*) "When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]" (*Ibid.*)

Appellants further contend that some of the prosecutor's comments violated *Griffin*. "*Griffin*'s prohibition against '"direct or indirect comment upon the failure of the defendant to take the witness stand,"' however, '"does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses."'" (*People v. Harrison* (2005) 35 Cal.4th 208, 257, quoting *People v. Hovey* (1988) 44 Cal.3d 543, 572.)

As to the prosecutor's comments about cross-racial identification, appellants have forfeited any claim of misconduct by failing to object. Even were we to consider the claim, we would find no misconduct. The prosecutor's comments were neither deceptive nor reprehensible. He merely used well-known African-Americans to demonstrate that cross-racial identification was not necessarily difficult. Moreover, as explained below, any error was harmless beyond a reasonable doubt.

As to the prosecutor's comments that no evidence supported the theory of Thompson's counsel that Thompson had walked away from Officer Smith because he was afraid,

we find no *Griffin* error. The prosecutor was merely commenting on the state of the evidence, namely that no evidence supported counsel's theory. In any event, for the reasons stated below, any error was harmless beyond a reasonable doubt.

As to the prosecutor's comments that defense counsel had subpoena powers and could call material witnesses, we find that there is a reasonable likelihood that the jurors could have construed these comments in an objectionable manner. The comments were made in response to defense counsel's argument that the prosecution case was insufficient. In that context, a jury might have interpreted the prosecutor's comments to suggest that defense counsel had a burden to call witnesses to challenge gaps in the prosecution's case. However, for the reasons stated below, the error was harmless beyond a reasonable doubt.

Finally, as to the prosecutor's comments that appellants provided no explanation as to why they were all arrested in the same general location, in close proximity to the U-Haul van, we find that these comments constituted *Griffin* error. As explained below, however, the error was harmless beyond a reasonable doubt, as the evidence of appellants' guilt was overwhelming.

The record shows that the robberies occurred in broad daylight, and the robbers made no attempt to hide their faces. Several victims identified appellants as the robbers at trial. Jackson and Spencer were arrested in close proximity to a U-Haul van containing hair extensions from Hair and

Compound. Thompson was arrested nearby, and he had hair extensions and victim MacDonald's iPhone on his person. DNA that matched appellants' DNA profiles were found on items in the U-Haul van, and Spencer's fingerprint was found on the inside cargo door of the van. On this record, the prosecutor's comments were harmless beyond a reasonable doubt.

F. *Ineffective Assistance of Counsel*

Jackson contends his trial counsel was ineffective for failing to request an instruction regarding his prior convictions, and for failing to object to the prosecutor's questioning him on the circumstances of the prior convictions.

1. *Relevant Factual Background*

In his direct testimony, Jackson stated that when he was 15 years old, he observed a friend being beaten up by police officers. He told the officers to stop, and they began beating him up. As a result of the assault, he woke up in the hospital three days later. He was charged with assault on a peace officer and robbery, and pled guilty to the charges. Jackson also stated that when he was 27 years old, he was involved in a "federal case" and had pled guilty to "conspiracy" so he could get probation.

On cross-examination, the prosecutor asked whether in the federal case, appellant recalled being charged with "armed robbery of a credit union." Jackson answered, "Nope." The prosecutor responded: "Nevertheless, you took

a deal for conspiracy to commit bank robbery, correct?" Jackson: "Yes, because -- yes. Yes."

Later, the prosecutor sought to connect the gloves containing Jackson's DNA to his prior conviction for robbery. The prosecutor: "Listen, Mr. Jackson. When it comes to these cases, you're savvy, right?" Jackson: "What is that?" The prosecutor: "You know what's going on, right?" Jackson: "No." The prosecutor: "As a matter of fact you know that these gloves, you can wear that inside out, correct?" Jackson: "No."

Later, the prosecutor asked: "Mr Jackson, would you expect somebody who when they're 15 or 14 . . . [are] convicted of a robbery, and 20 years later they're still involved in the same type of activity, you don't think that person would have some kind of --" Jackson: "You say, 'involved.' I mean, see. That's -- that's what's wrong. Now why I can't get a job. I suffered the consequences for what I did when I was 15. And now you think -- still using it against me." The prosecutor asked: "How about for what you did a few years ago in the bank robbery?" Jackson responded: "I didn't do nothing in no bank robbery. I never had no bank robbery. And you keep talking about gloves. What gloves? The victim said the --" The prosecutor: "Thank you, sir. Thank you. Nothing further."

Jackson's counsel did not object to the prosecutor's questions. Nor did he request the trial court to instruct the jury that it could consider Jackson's prior convictions for assault with a firearm on a peace officer and robbery only in

evaluating Jackson's credibility and not for any other purpose.

2. *Analysis*

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. . . . If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

In addition, "*Strickland v. Washington* (1984) 466 U.S. 668, 697, informs us that 'there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as

a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

Here, the record sheds no light on why trial counsel did not object to the prosecutor's questions or why he did not request a limiting instruction. Having elicited the fact of the convictions on direct examination, defense counsel may have sought not to draw further attention to them. More important, Jackson has not shown prejudice. As detailed above, Jackson was identified as one of three robbers by several victims at trial. Shortly after the robberies, he was arrested in close proximity to the U-Haul van used in the robberies. Finally, his DNA was found on items inside the van. On this record, appellant has not shown a reasonable probability that his trial counsel's alleged errors undermined confidence in the jury's verdicts. Accordingly, we reject appellant's ineffectiveness claim.

G. *Cumulative Error*

Finally, appellants contend there was cumulative error. "To the extent there are a few instances in which we have found error or assumed its existence, no prejudice resulted. The same conclusion is appropriate after considering their cumulative effect." (*People v. Valdez* (2012) 55 Cal.4th 82, 181.) Similarly, the cumulative effect of any errors in this case was not prejudicial.

H. *Sentencing Issues*

Appellants raise several sentencing issues. All appellants contend -- and respondent concedes -- (1) that a five-year enhancement based on count 9 (grossly negligent discharge of a firearm) should be stricken, and (2) that they are entitled to resentencing on that count. Jackson and Thompson contend there was insufficient evidence to support the trial court's finding that they had suffered two prior strikes. They further contend that the abstracts of judgment incorrectly reflect the trial court's oral pronouncement of sentence.

1. *Sentencing Enhancement for Discharge of a Firearm*

Howard testified that during his pursuit of the U-Haul van, an individual peered out of the van and shots were fired at him. Howard could not identify the shooter. The jury convicted each appellant of grossly negligent discharge of a firearm (count 9). The trial court imposed on each appellant a five-year enhancement based on the count (§ 667, subd. (a)).

Appellants contend there was insufficient evidence to support the enhancement, as no evidence was presented on who actually discharged the firearm. Section 667, subdivision (a) applies only to crimes defined as serious felonies under section 1192.7, subdivision (c). (§ 667, subd. (a)(4).) Respondent acknowledges that in the instant case, the enhancement pursuant to section 667, subdivision (a), requires proof that a defendant personally used a firearm

(see *People v. Golde* (2008) 163 Cal.App.4th 101, 111-112), and that there was insufficient evidence on this element. Respondent requests that this court strike the enhancement as to each appellant, and we will exercise our discretion to do so.

2. *Resentencing Pursuant to Three Strikes Reform Act of 2012*

Appellants were sentenced to indeterminate life terms on count 9 (grossly negligent discharge of a firearm). They argue that as that crime was not a serious felony, they should have been sentenced to determinate terms pursuant to the Three Strikes Reform Act of 2012. Respondent agrees. Accordingly, we will vacate the sentence on count 9 and remand for resentencing on that count.

3. *Jackson's Prior Strike Convictions and Abstract of Judgment.*

During the court trial on Jackson's priors, the prosecutor submitted a 969b packet. The trial court noted that the documents showed two strikes: the first one for robbery, and the second for assault with a firearm on a peace officer. Defense counsel argued there should be one strike instead of two, as "it's basically all one case." He stated: "Police came to the scene, and [the] second count occurred." In response to counsel's claim that it was the "same charge, same victim," the prosecutor stated: "It's actually two separate victims, Your Honor. What happened is there was a robbery. The officers show up at the robbery. And then there was an actual shootout with the defendant with the

officers. So it's definitely two separate victims, Your Honor, as qualifying as two separate strikes. It wasn't the officers who were robbed." Defense counsel did not object to this recitation of facts. The court noted that "if it was the same course of conduct with all the same elements, it would either have been stayed pursuant to 654 or it would have been just dismissed as a count. But it's not." The court found true the strike allegations as to Jackson.

"In determining the truth of a prior conviction allegation, the trier of fact may look to the entire record of the conviction, but no further." (*People v. Thoma* (2007) 150 Cal.App.4th 1096, 1101 (*Thoma*), citing *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356.) "The record of the prior conviction includes transcripts of the preliminary hearing, the defendant's guilty plea, and the sentencing hearing. [Citations.]" (*Thoma*, *supra*, at p. 1101.) "[T]he trier of fact may draw reasonable inferences from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate. Unless rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction. [Citation.] [¶] On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. " (*People v. Miles* (2008) 43 Cal.4th 1074, 1083, italics omitted (*Miles*).)

Here, the record established that Jackson suffered two convictions -- robbery and assault with a firearm on a peace officer. As the court noted, had the victim or the course of conduct been the same, one of the counts would have been dismissed or the sentence on a conviction stayed pursuant to section 654. Because neither occurred, the trial court reasonably inferred that the two offenses were committed against different victims and involved different acts. (See *Miles*, *supra*, 43 Cal.4th at p. 1081 [trier of fact may draw reasonable inference from record].) This inference was not rebutted by defense counsel. Accordingly, there was substantial evidence to support the trial court's true findings on the strike allegations.

Jackson also contends that the abstract of judgment incorrectly reflects imposition of a four-year concurrent term on count 10 (felon in possession of a firearm), whereas the trial court's oral pronouncement of sentence reflects that the court stayed the sentence on that count pursuant to section 654. We agree that the abstract of judgment incorrectly reflects the trial court's oral pronouncement of sentence, and will order it corrected.

Jackson further contends the 10-year enhancement for personal use of a firearm on count 9 should be stricken, as it was not mentioned in the trial court's oral pronouncement of sentence and the jury did not find that he personally discharged a firearm with gross negligence. We agree and

exercise our discretion to strike the 10-year enhancement on count 9.[4]

4. *Thompson's Prior Strike Convictions and Abstract of Judgment.*

In the information, it was alleged that Thompson had suffered two federal convictions for bank robbery that qualified as strikes, both from Oklahoma. During the court trial on Thompson's priors, the prosecutor submitted a 969b packet showing that in Oklahoma in 2006, appellant had been convicted of violating title 18 United States Code section 2113(a). The prosecutor then sought to amend the information according to proof that the second qualifying strike was a 2002 conviction for violating title 18 United States Code section 2113(a), arising from a federal case in California. Thompson's attorney objected, and the court overruled the objection, allowing the prosecutor to amend the information.

Thompson's counsel then argued that the federal convictions did not qualify as strikes under California law, because there was insufficient evidence to show that force or

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[4] For the same reasons, with respect to Spencer's abstract of judgment, we will exercise our discretion to correct the abstract of judgment to conform to the oral pronouncement of judgment. Accordingly, we strike the 10-year enhancement for personal firearm use in connection to count 9, and order the abstract of judgment corrected to reflect that the four-year term on count 11 (felon in possession of a firearm) is stayed.

violence was used to commit the bank robberies. Counsel noted that the charging documents indicated that Thompson was not the person who entered the bank to commit the robbery, but was the driver of the getaway vehicle. The prosecutor argued that the charging documents showed that force and violence were used to commit the bank robberies. Defense counsel reiterated that the documents indicated that another individual had entered the bank and stated, "This is a bank robbery." No evidence showed a weapon was used, and Thompson was not in the bank at the time. The court found true both strike allegations. It determined that in both federal cases, Thompson was convicted of bank robbery and the charging documents alleged an aiding and abetting theory. Under aiding and abetting liability, Thompson was "responsible for whatever the crime was."

"To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California." (*People v. Avery* (2002) 27 Cal.4th 49, 53; see also §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) Thompson was convicted of violating title 18 United States Code section 2113(a). The first paragraph of title 18 of the United States Code section 2113(a) describes a person who, "by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association." The second paragraph

describes a person who "enters or attempts to enter any bank, credit union, or any savings and loan association, . . . with intent to commit in such bank, credit union, or in such savings and loan association, . . . any felony affecting such bank, or such savings and loan association and in violation of any statute of the United States, or any larceny." As our Supreme Court has explained: "The California serious felony of bank robbery substantially coincides with the offense described in the first paragraph of section 2113(a) . . . . However, there is no California serious felony that corresponds to the crime described in the second paragraph of section 2113(a). Thus, evidence that the defendant suffered a previous conviction under section 2113(a), standing alone, cannot establish that the conviction was for a serious felony under California law." (*Miles*, *supra*, 43 Cal.4th at pp. 1081-1082, italics & fns. omitted.) "Where, as here, the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue." (*Miles*, *supra*, at p. 1082.)

Here, in the California federal case, the judgment shows that Thompson pled guilty to "18 U.S.C. Section 2113(a): Bank robbery." The complaint alleged that appellant and a codefendant used "force, violence, and intimidation" in committing the offense. In the Oklahoma federal case, Thompson pled guilty to "18 U.S.C. §§ 2113(a) and 2(a)" for "Bank robbery, and aiding and abetting" as

charged in the indictment. The indictment alleged that Thompson and his codefendant used "force, violence and intimidation" to commit the offense. On this record, there was substantial evidence to support the trial court's determination that the federal bank robbery convictions qualified as strikes under California law.[5]

Finally, Thompson contends that the abstract of judgment incorrectly reflects imposition of a four-year concurrent term on count 12 (felon in possession of a firearm), whereas the trial court's oral pronouncement of sentence reflects that the court stayed the sentence on that count pursuant to section 654. Respondent concedes the

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[5] Thompson further contends that because a violation of title18 of the United States Code section 2113(a) is a general intent crime whereas California's bank robbery statute is a specific intent crime, a conviction for violating title 18 of the United States Code section 2113(a) does not qualify as a serious felony under California law. This argument is foreclosed by the Supreme Court's holding in *Miles* that a judgment of conviction under title 18 of the United States Code section 2113(a) for "armed bank robbery" may be used to enhance a sentence under section 667, subdivision (a)(1) (five-year enhancement of current serious felony conviction for prior serious felony conviction) and for purposes of the Three Strikes law. (*Miles*, *supra*, 43 Cal.4th at pp. 1079, 1094.)

error, and requests this court correct the abstract of judgment. We exercise our discretion to do so.[6]

DISPOSITION

As to all appellants, the five-year enhancement pursuant to section 667, subdivision (a) for grossly negligent discharge of a firearm is stricken. The sentences on count 9 (grossly negligent discharge of a firearm) are vacated, and the matter is remanded for resentencing on that count. As to appellant Jackson, the 10-year enhancement for personal firearm use on count 9 is stricken, and the abstract of judgment is corrected to reflect that the four-year sentence on count 10 (felon in possession of a firearm) is stayed. As to appellant Spencer, the 10-year enhancement for personal firearm use on count 9 is stricken, and the abstract of judgment is corrected to reflect that the four-year sentence on count 11 (felon in possession of a firearm) is stayed. As to appellant Thompson, the abstract of judgment is corrected to

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[6] Thompson contends that the abstract of judgment incorrectly reflects imposition of a section 667, subdivision (a), enhancement on count 12 (being a felon in possession of a firearm). The abstract of judgment in our record does not reflect imposition of such enhancement.

reflect that the four-year sentence on count 12 (felon in possession of a firearm) is stayed. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.